

Supreme Court, U.S.
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In The
Supreme Court of the United States

TU MY TONG,

Petitioner,

v.

WILLIAM H. BROWNSTEIN & ASSOCIATES,
et al.

Respondents .

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is it a violation of due process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution for a court to enforce an oral settlement against a party in the absence of an interpreter after the court has ordered the presence of an interpreter for that party due to her limited understanding of the English language?

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JURISDICTIONAL GROUNDS FOR PETITION

This Petition for Writ of Certiorari seeks review of a denial of review by the Supreme Court of the State of California on November 12, 2008.¹ (Appendix p. -14-) following an unpublished decision of the Court of Appeal of the State of California filed August 29, 2008. (Appendix pp. -1- through -13-)

This Petition is proper and timely and within the jurisdiction of this Court pursuant to the United States Constitution, Article III, Section 2, Clause 1 and Rules of the Supreme Court of the United States, Rule 13.1 and 28 U.S.C. 2101(c).²

Tu My Tong v. William H. Brownstein & Associates (2008) Court of Appeal of the State of California, Case number B199596. The opinion of the Court of Appeal and the order denying review by the Supreme Court of California are reproduced in the Appendix hereto.

² The time to file this Petition for Writ of Certiorari was extended through and including February 25, 2009 by order of the

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment V provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." The United States Constitution, Amendment XIV provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Honorable Justice Kennedy issued on February 3, 2009.
(Application No. 08A664).

STATEMENT OF THE CASE³

Tong initiated this action against her former legal counsel, the Respondents William H. Brownstein & Associates and William H. Brownstein (collectively "Brownstein") on June 20, 2005. (CT 008). The gist of her claims is that Brownstein breached his fiduciary duty owed to her as her former lawyer by representing Tong's adversaries in a separate legal action also now pending in Los Angeles Superior Court, entitled *Tong v. Rone, et al.*, L.A.S.C. Case No. BC357508 ("Rone action"). (CT 061:4-26). The *Rone* action concerns a dispute between Tong and a trust deed holder concerning Tong's right to pay off the lien on certain valuable real property owned by Tong. Tong alleges that Brownstein has confidential information as a result of his prior representation of her that gives her adversaries an unfair advantage in the *Rone* action and exposes her to the risk of losing the subject real property through an unjustified foreclosure. (CT 115:26-30).

Tong asserts that her due process rights were

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"CT" refers to the Clerk's Transcript prepared for the appeal to the California Court of Appeal. "RT" refers to the Reporter's Transcripts for the same appeal. All statutory references are to California statutes unless otherwise indicated.

violated when the trial court enforced a purported oral settlement based on an ambiguous exchange with Tong in open court. Although the trial judge had previously recognized that Tong has limited English ability and had actually ordered that an interpreter be present to assist her in understanding the terms of any proposed settlement, through no fault of Tong's, no interpreter was present at the settlement hearing, she did not understand or agree to the terms of any settlement and she was deprived of her fundamental right to due process when the settlement was enforced against her.

Specifically, before the purported oral settlement, trial of this action was scheduled for February 20, 2007. (RT 2:19-22). On January 31, 2007, the judge assigned to the case, the Hon. William F. Fahey in Department 78 of the Superior Court, held a hearing during which he ordered the parties to attend a Mandatory Settlement Conference to take place on February 7, 2007. (RT 8:17-21; 9:5-10). Because Judge Fahey was scheduled to be in trial that day, he indicated that another judge would preside over the MSC. (RT 9:8-10).

Although Tong was not present during the January 31st hearing (RT 1:11; CT 121:20-22), as a result of his prior familiarity with the case, Judge Fahey was aware of Tong's limited ability to understand and communicate in English. Consequently, during the January 31st hearing, Judge Fahey *sua sponte* raised with Tong's counsel, Fred Rucker, the need to have an interpreter at the MSC to translate the proceedings for Tong:

The Court: . . . Your client has occasional difficulty with the English language?

Mr. Rucker: Yes, she does, your honor.

The Court: Then we'll need to have an interpreter present, I think. . . .
(RT 8:21-26).

Judge Fahey then ordered Mr. Rucker to have an interpreter present at the MSC:

The Court: . . . Plaintiff will provide an interpreter. She speaks a dialect of Chinese, does she?

Mr. Rucker: Vietnamese, I believe, your honor.

The Court: All right, a Vietnamese interpreter.
(RT 9:11-14).

At the time of the January 31st hearing, Brownstein and his legal counsel were also fully aware of Tong's language limitations since they had routinely provided an interpreter for Tong during her prior deposition testimony in the action. (CT 122:1-6; 133:19-26).

After the January 31st hearing before Judge Fahey, an MSC was eventually scheduled to be held before the Hon. Alice E. Altoon in Department 28 on February 16, 2007, only four days before the scheduled trial date of February 20th. According to Tong's uncontroverted declaration, when she arrived at the MSC that day she was surprised to discover that her lawyer, Mr. Rucker, had been unable to locate a Vietnamese interpreter. (CT 122:28-123:5). Immediately upon learning this information, she made unsuccessful attempts to locate a friend or family member who could attend the MSC that day and translate the proceedings for her. (CT 011-012; 122:28-123:5). Although she was unable on such short notice

to locate such a substitute interpreter, the MSC could not be rescheduled because of the impending trial date. Consequently, the MSC proceeded even though Tong had only a partial understanding of what was said by the participants during the conference.

The transcript from the February 16th MSC reflects that Judge Altoon took the bench that day with both litigants, Tong and Brownstein, and their counsel present in the courtroom. (RT 301:1-21). Judge Altoon announced her understanding that the parties had reached a "settlement" and asked counsel to state orally the terms of the purported settlement for the record. (RT 302:2-6). Brownstein's counsel then recited the terms of the purported oral settlement, which included, *inter alia*, an agreement (i) that Brownstein pay \$25,000 to Tong in the form of a check made payable to Mr. Rucker's trust account; (ii) that Civil Code section 1542 applied to the settlement; (iii) that the settlement would be enforceable pursuant to Code of Civil Procedure section 664.6, even though the parties intended to reduce the settlement to a formal written agreement; and (iv) that the Superior Court would retain jurisdiction to enforce the settlement. (RT 302:7-303:19).

Immediately after the recitation of the settlement by Brownstein's counsel, Judge Altoon asked Tong whether she had heard the "terms and conditions" stated by counsel:

The Court: . . . And Ms. Tong, you've heard the terms and conditions. Do you agree to that, ma'am?

Ms. Tong: Yes, your honor.
(RT 303:21-23).

However, thereafter Judge Altoon did not explicitly ask Tong whether she *assented* to the settlement - *i.e.*, whether she *agreed to be bound* to the terms and conditions stated by counsel on the record. Indeed, at no point during the recorded proceedings in open court did either Judge Altoon or counsel ever clearly and unambiguously ask Tong whether she consented to or accepted the settlement. Instead, the only evidence in the record is the above-quoted colloquy between Judge Altoon and Tong, during which Judge Altoon appeared to ask whether Tong had "*heard*" the terms and conditions, to which Tong replied in the affirmative. As discussed below, such equivocal evidence has never been held sufficient to form an oral settlement enforceable under section 664.6.

Tong has submitted sworn declarations that, due to the lack of an interpreter, she did not fully understand what the participants were saying at the February 16th conference and believed that during the above-quoted colloquy Judge Altoon was merely asking her whether she had heard the statements made by Brownstein's counsel. (CT 123:24-124:3). She attested in her declarations to the fact that she was not willing to settle this action, especially for the modest sum of \$25,000, since she believed that Brownstein's assistance of her adversaries in the *Rone* action had caused her considerably larger damages. (CT 12:15-26). Her declaration indicates that she did not learn of

the purported settlement until after the MSC when Mr. Rucker explained to her the significance of the statements made by the participants during the conference. (CT 124:1-3). Tong terminated Mr. Rucker's representation, and a Substitution of Attorney form reflecting Tong's representation of herself *in propria persona* was filed February 22, 2007. (CT 028-29).

On March 6, 2007, now acting *in proper*, Tong appeared ex parte in Department 78 before Judge Fahey and filed a hand-written document styled as an "Ex Parte Application Requesting order of Plaintiff Tu My Tong For order a Judgment Dispute [sic] the settlement UNFAIR [sic] Feb. 16. 07 at Dept. 78. [sic]" (CT 030-53). The fractured English employed throughout this document and other hand-written documents filed by Tong on her own behalf is itself powerful evidence of the severe language limitations under which Tong was laboring during the February 16th MSC. In this document, which was submitted in the form of a validly executed declaration, Tong explained at length her unwillingness to settle this action and emphasized her lack of understanding of the proceedings which supposedly culminated in an oral settlement:

I need the translater [sic], he called but the translater doesn't come. . . . I do not understand what the Judge [Altoon] and the lawyer talk very fast in hight [sic] level English that I can't afford [sic] - I do not know what going on so seriously in this matter like as Brownstein & Rone Filed Foreclosure [sic] my property on the way but I don't too [sic] I am

strongly oppo [sic] the settlement and pray for the Judge of Dept 78 [Judge Fahey] to dispute that. (CT 035:6-18).

Judge Fahey declined to rule immediately on Tong's ex parte application and instead continued the hearing on the application until March 19, 2007, at which time it could be heard in conjunction with the hearing of an order to show cause why the case should not be dismissed. (RT 602:8-17; CT 054:55). Thereafter, on March 8, 2007, Brownstein filed (i) a motion to enforce the purported settlement pursuant to Code of Civil Procedure section 664.6 and (ii) an opposition to Tong's ex parte application. (CT 059:113).

On March 14th, while still appearing *in proper*, Tong filed an opposition to Brownstein's motion to enforce and a reply in support of her ex parte application, both ghost-written with the informal assistance of legal counsel other than Mr. Rucker. (CT 114:156). In her reply brief, Tong requested relief from the purported settlement pursuant to Code of Civil Procedure section 473(b) on the grounds of "excusable mistake." (CT 130:1-131:15). She also argued that the settlement should be vacated because she was not provided with an interpreter as required by Evidence Code section 752(a) and as ordered by Judge Fahey on January 31st. (CT 131:20-132:6). In a declaration filed with these papers, Tong swore under oath, in relevant part, as follows:

10. While I can speak in broken English, I have great difficulty understanding English when it is spoken quickly and when the speakers use legal terminology. It is my practice to obtain copies of all transcripts of proceedings so I can review them slowly with an English/Vietnamese dictionary to obtain an understanding of what occurred.

11. Later during the settlement conference, Judge Alice Altoon and the attorneys were talking about things I did not understand. They were speaking very quickly and using big legal words. *At one point, I believed Judge Altoon asked me whether I heard the terms and conditions of the settlement. I said "Yes." That is the only single word I have on the record. I never stated that I agreed with the settlement terms because I definitely did not.* Shortly, [sic] thereafter the conference was over. That is when I realized a settlement had been entered on the record. (CT 135:7-21; emphasis added).

Apparently on the same date, March 14, 2007, Tong also inexplicably filed yet another reply brief, this time handwritten by herself. (CT 164-188). In the caption and introduction to this document, Tong prominently requested relief pursuant to Code of Civil Procedure section 473(b) based on excusable mistake. (CT 164-165). Once again, the fractured language in these papers evidences Tong's severe limitations with

the English language.

On March 19, 2007, Judge Fahey heard Tong's application to set aside the settlement under section 473(b) and Brownstein's cross-motion to enforce the settlement under section 664.6. (RT 901:905). However, during the hearing, Judge Fahey at no time explicitly addressed Tong's request for relief under section 473(b). Instead, Judge Fahey indicated that he had read the transcript of the February 16th MSC before Judge Altoon and that Judge Altoon was a "very competent and experienced jurist." (RT 901: 24-27). He then speculated on the record that Judge Altoon "would have noted during the proceedings had there been a problem with plaintiff's ability to understand what was occurring during the settlement conference." (RT 901:28-902:3). Judge Fahey also stated that the transcript of the February 16th proceedings "reflect[ed] that [Tong] agreed to settle the case" and did not reflect any indication that "[Tong] could not understand the proceedings and the settlement terms." (RT 902:8-13). Judge Fahey further stated, presumably referring to Tong's typewritten declaration filed March 14th, that "[Tong] ha[d] filed a declaration, and it is in English. There's no indication that a translator was used" (RT 902:14-16). Judge Fahey conspicuously failed to mention his own statement from the January 31st hearing, in which he noted Tong's difficulty with English and ordered an interpreter to be present at the MSC. (RT 9:11-14, *supra*). Judge Fahey also pointedly failed to mention Tong's many handwritten declarations and other papers which clearly reflect Tong's limited comprehension of English.

Nevertheless, based on his review of the transcript and confidence in Judge Altoon's abilities, Judge Fahey concluded as follows:

... I feel confident, based upon all of these facts, that the plaintiff, Ms. Tong, knowingly and intelligently **understood** the settlement of this case, including the posture of the case, and therefore, I think the settlement should be enforced.

(RT 902: 16-21; emphasis added).

Significantly, as the above quotation from the transcript indicates, Judge Fahey's central conclusion was that Tong "knowingly and intelligently understood the settlement" - not that Tong **agreed to** the settlement. As discussed below, this conclusion misapprehends the nature of the crucial question with respect to enforcement of the settlement - i.e., whether Tong orally accepted the settlement on the record before Judge Fahey.

After further colloquy between Judge Fahey and Brownstein's counsel during the March 19th hearing regarding the form of the order and settlement payment, Judge Fahey stated his decision that he would sign an order enforcing the settlement. (RT 903:5-904:7; CT 208-211). In response, even though Judge Fahey had explained his decision at length, Tong appeared confused and asked Judge Fahey a series of questions reflecting her uncertainty regarding what Judge Fahey had just decided:

Ms. Tong: Your honor, you accept the settlement on February 16?

The Court: I think [sic] settlement was proper on the 16th of February before Judge Altoon, yes.

Ms. Tong: So you accept that?

The Court: I do.

Ms. Tong: Can I up [sic] you for another court, your honor?

The Court: I can't give you legal advice

(RT 904:8-16).

At no time during or after the March 19th hearing did Judge Fahey expressly consider or analyze any of the criteria for relief under Code of Civil Procedure section 473(b) based on excusable mistake or neglect.

Apparently not understanding the finality of Judge Fahey's March 19th decision, Tong appeared ex parte and filed another handwritten ex parte application on March 21, 2007, seeking to set aside the settlement on the alternative grounds that she had signed the Substitution of Attorney form relieving Mr. Rucker as her lawyer effective February 15, 2007 – one day before the February 16th MSC in which Mr. Rucker had supposedly represented her interests. (CT 189-207). At the hearing on March 21st, Judge Fahey denied Tong's application on the ground that the Substitution of Attorney form had not been filed until February 22nd, six days after the MSC, and further that Tong's application was an improper request for reconsideration of the Court's March 19th decision. (RT 1202:19-1203:5; 1203:26-1204:9).

Tong's final plea to Judge Fahey during the

March 21st hearing is a telling example of the language barrier which caused her original misunderstanding of the settlement proceedings on February 16th:

[Tong to the Court:] So Mr. McCord and Mr. Rucker, two lawyer talk very fast and talk in some high level in front of the court, and that date I swear - I don't understand what both lawyer talk on the record. I understand some in the court with the judge, but I read the court transcript. Very high - many word I don't understand. I only understand when I reading. I confess I have a problem for listening [sic, probably means "understanding"], but I can read things well with the dictionary help. So when I read the court transcript, I know [sic, probably should be "no" or "not"] certainly agree to settlement with Mr. Rucker and Mr. McCord.

(RT 1205:13-23).

Judge Fahey denied Tong's March 21st *ex parte* application and entered an order enforcing the settlement pursuant to section 664.6 on April 3, 2007. (CT 212-218).

Tong appealed. On August 29, 2008 the Court of Appeal of the State of California, Second Appellate District, Division Eight, issued its decision affirming the trial court's order enforcing the settlement. (App. 1.1-1.11) Tong timely filed a Petition for Review to the California Supreme Court. That Petition was summarily denied on November 12, 2008. (App. 1.12.)

ARGUMENT

I. PETITIONER WAS DEPRIVED OF HER CONSTITUTIONAL RIGHT TO DUE PROCESS WHEN THE COURT ENFORCED AN ORAL SETTLEMENT DESPITE THE ABSENCE OF AN INTERPRETER WHICH THE COURT ITSELF HAD ORDERED

The Due Process clause of the Fifth Amendment of the United States Constitution, which applies to the states through the Fourteenth Amendment, guarantees that no person shall be deprived of "life, liberty, or property without due process of law."

As this court recognized in *Boddie v. State of Connecticut* 401 U.S. 371, 375, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971),

At its core, the right to due process reflects a fundamental value in our American constitutional system. . . . due process requires, at a minimum, that absent a countervailing state interest of overriding significance, *persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard*. . . . What the Constitution does require is 'an opportunity granted at a meaningful time and in a manner . . . for a hearing appropriate to the nature of the case. . . . In short, 'within the limits of practicability, *a State must afford to all individuals a meaningful opportunity to*

*be heard if it is to fulfill the promise of the Due Process Clause. (Boddie, *supra*, 401 U.S. at 377-379 [emph. added].)*

Under California Evidence Code section 752(a), it is compulsory to provide an interpreter whenever a witness is incapable of understanding or expressing himself or herself in the English language:

When a witness is incapable of understanding the English language or is incapable of expressing himself or herself in the English language so as to be understood directly by counsel, court, and jury, an interpreter whom he or she can understand and who can understand him or her **shall be sworn** to interpret for him or her.

Evid. Code § 752(a) (emphasis added).

By the same token, such a person is disqualified from being a witness unless an interpreter is provided. *See* Evid. Code § 701(a).

In addition, Standard 2.10(a) of the Standards of Judicial Administration provides:

An interpreter is needed if, after an examination of a party or witness, the court concludes that: (1) The party cannot understand and speak English well enough to participate fully in the proceedings and to assist counsel; or (2) The witness cannot speak English so as to be understood directly by counsel, court, and jury.

Jud. Adm. Standard 2.10(a).

Moreover, Standard 2.10(b) states that a court should examine a party or witness on the record to determine whether "an interpreter is needed." Jud. Adm. Standard 2.10(b).

Although there is no constitutional right to have an interpreter provided at public expense to a litigant in a civil action, (*see Jara v. Municipal Court* (1978) 21 Cal. 3d 181), multiple examples exist under California law of courts or the Legislature recognizing the fundamental importance of non-fluent English speakers having access to interpreters. (*See, e.g., Gardiana v. Small Claims Court* (1976) 59 Cal. App. 3d 412 (interpreter should be appointed in small claims action at public expense); Health & Safety Code § 1259 (mandating interpreters or bilingual staff at general acute care hospitals); Lab. Code § 105 (requiring Labor Commissioner to provide interpreters in public contact positions and at all hearing and interviews where appropriate); Lab. Code § 4600 (requiring interpreter for worker's compensation examination).

In this case, Judge Fahey rightly recognized, during the January 31, 2007 hearing, Tong's need for an interpreter during the MSC and, accordingly, ordered Tong's lawyer, Mr. Rucker, to make arrangements for such interpreter. However, through excusable mistake or neglect, Mr. Rucker was unable to locate a suitable Vietnamese interpreter for the February 16th MSC, and Tong herself, when she discovered the lack of an interpreter on that date, was unable to arrange on short notice for a friend or family member to attend the MSC and assist with translation of the proceedings.

During the March 19th hearing discussed above,

Judge Fahey based his decision to enforce the settlement on (i) his review of the transcript of the February 16th proceedings, (ii) his confidence in Judge Altoon's abilities and (iii) his review of the ghost-written declaration that Tong filed in support of her reply brief requesting that the settlement be set aside under section 473(b), which Judge Fahey indicated did not expressly reflect the use of a translator. But Judge Fahey made no mention whatsoever of his own prior determination that Tong needed the assistance of an interpreter. Nor did he address the ample evidence of Tong's lack of English proficiency contained in the transcripts of the various proceedings and in Tong's own hand-written papers filed in conjunction with the parties' cross-motions to enforce and set aside the settlement.

Tong submits that the various factors relied on by Judge Fahey - including the transcript of the ambiguous colloquy between Judge Altoon and Tong during the February 16th MSC, Judge Fahey's confidence in Judge Altoon's abilities and Tong's own demonstration of her limited English language skills, as reflected in her court filings and various oral statements on the record -- constitute insubstantial evidence to support Judge Fahey's ruling enforcing the settlement. To hold otherwise would make a mockery of the requirement of proof of unambiguous consent as required under California's Code of Civil Procedure section 664.6.⁴

⁴ That section provides, in pertinent part, that "If parties to pending litigation stipulate, . . . orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." The California Supreme Court has established that "in ruling upon a

Moreover, to the extent Judge Fahey based his ruling on Tong's apparent silence or lack of objection during the February 16th MSC, such reasoning is obviously circular since Tong's lack of comprehension of the proceedings presumably would explain such ,

section 664.6 motion for entry of judgment enforcing a settlement agreement, and in determining whether the parties entered into a binding settlement of all or part of a case, the trial court should consider whether (1) the material terms of the settlement were explicitly defined, (2) the supervising judicial officer questioned the parties regarding their understanding of those terms, and (3) the parties *expressly acknowledged their* understanding of *and agreement to be bound by* those terms." (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911 [emph. added].)

silence or lack of objection on her part. Furthermore, mere silence or inaction by a litigant at a settlement proceeding is never sufficient to connote the assent to a settlement required by section 664.6. (*Johnson v. Department of Corrections* (1995) 38 Cal.App.4th 1700; *Conservatorship of McElroy* (2002) 104 Cal.App.4th 536.) Rather, **unambiguous assent** is required.

In the absence of substantial evidence that Tong gave such unambiguous assent with the assistance of an interpreter, Judge Fahey's order enforcing the purported oral settlement under section 664.6 cannot continue to stand. Moreover, enforcement of a settlement which statutorily requires the unambiguous consent of the party against whom it is being enforced, necessarily requires that the party be able to comprehend the terms of the settlement. Where, as here, the court itself has made a finding that the party has limited English ability and requires the assistance of an interpreter for purposes of settlement discussions, and where, through no fault of the party that interpreter is not provided, enforcement of a purported oral settlement based on an ambiguous question and a one-word response, constitutes a deprivation of any "meaningful opportunity" to participate in the proceedings. Enforcement of the purported oral settlement under these circumstances constitutes a violation of the petitioner's constitutionally guaranteed right to due process.

II. THE PURPORTED ORAL SETTLEMENT DOES NOT MEET THE LEGAL CRITERIA TO BE ENFORCEABLE UNDER SECTION 664.6.

In addition to the due process violation

occasioned by the court's enforcement of a purported oral settlement in the absence of an interpreter, petitioner contends that the oral settlement did not meet the strict statutory legal criteria required under California Code of Civil Procedure section 664.6. The transcript of the February 16th MSC reflects that Judge Altoon asked Tong whether she agreed that she had "*heard*" the "terms and conditions" stated in open court by Brownstein's counsel, to which Tong responded "Yes." But Judge Altoon and counsel at no time asked Tong on the record whether she *agreed to* or *accepted* such terms and conditions. Viewed most charitably, the transcript at most reflects an ambiguous exchange of words between Judge Altoon and Tong, which Judge Altoon may have subjectively believed sufficient to establish the existence of an agreement but which a reasonable person fluent in English - let alone a native Vietnamese speaker like Tong -- might objectively have believed conveyed a different meaning. The lack of any clearly-stated assent by Tong on the record results in the inescapable conclusion that the purported settlement is not enforceable under Code of Civil Procedure section 664.6.

Should certiorari be granted, petitioner asks this court to address this issue of statutory interpretation.

III. THE SUPERIOR COURT'S FAILURE TO ADDRESS OR RULE UPON TONG'S REQUEST FOR RELIEF UNDER SECTION 473(b) IS AN ABUSE OF DISCRETION.

Additionally, petitioner asserts that Judge

Fahey compounded the errors discussed above by failing, perhaps through inadvertence or oversight, to address or rule upon Tong's request for relief under Code of Civil Procedure section 473(b), which provides for relief from errors based on "mistake, inadvertence, surprise or excusable neglect." Although Tong's original ex parte papers filed March 6, 2007 were arguably somewhat ambiguous as to the theory of relief requested, her typewritten and handwritten reply briefs, both filed March 14th, made clear that she was seeking to set aside the purported settlement based on excusable mistake or neglect under section 473(b). Nevertheless, the transcripts of the proceedings on March 19th and March 21st reflect that at no time did Judge Fahey expressly take up the issue of excusable mistake or neglect or of Tong's request for relief under section 473(b).

As pointed out by the Supreme Court in *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258, setting aside a settlement under section 473(b) which was entered into either without the client's consent or as a result of mistake does not violate either public policy or contract principles. "Although the law favors settlements, it only favors *authorized* settlements." *Zamora, supra*, 28 Cal. 4th at 260 (emphasis in original; citations omitted). Likewise, rescission of a settlement agreement based on mistake -- even when the mistake is unilateral and not mutual -- is appropriate "where "the effect of the mistake is such that enforcement of the contract would be unconscionable'." *Zamora*, 28 Cal. 4th at 261 (quoting *Donovan v. RRL Corp* (2001) 26 Cal. 4th 261, 281).

Here, Judge Fahey's failure to address and rule

upon Tong's request for relief under section 473(b) "exceeds the bounds of reason" and therefore constitutes an abuse of discretion. *See Denham v. Superior Court (Marsh & Kidder)* (1970) 2 Cal. 3d 557, 566 (discussing abuse of discretion standard); *People v. Bigelow* (1984) 37 Cal. 3d 731, 744-745 (abuse of discretion for trial court to fail to rule on meritorious motion).

Should certiorari be granted, petitioner requests that this court address this issue of statutory interpretation.

CONCLUSION

For all the foregoing reasons, this Court is respectfully requested to grant certiorari in this case.

Respectfully submitted,

DATED: 2/25/09

TU MY TONG,
Petitioner in pro se

Filed 8/29/08 Tong v. William H. Brownstein &
Assocs. CA2/8

**NOT TO BE PUBLISHED IN THE OFFICIAL
REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT**

TU MY TONG,) B199596
) (Los Angeles
Plaintiff and Appellant,) County Super.
) Ct. No.
v.) BC335295
)
WILLIAM H. BROWNSTEIN &)
ASSOCIATES, et al.,)
)
Defendants and)
Respondents.)
)

APPEAL from an order of the Superior Court
of Los Angeles County. William F. Fahey and Alice

E. Altoon, Judges. Affirmed.

Law Offices of Gregg A. Farley and Gregg A. Farley for Plaintiff and Appellant.

Berman, Berman & Berman, James W. McCord and William M. Aitken for Defendants and Respondents.

Tu My Tong appeals from an order granting respondent's motion to enforce a settlement agreement. (See Code Civ. Proc., § 664.6.) We affirm.

FACTS

In June 2005, Tong sued William H. Brownstein and William H. Brownstein & Associates (hereinafter, "Brownstein"), her former bankruptcy attorneys, for breach of fiduciary duties. The matter was set for trial on February 20, 2007.

On January 31, 2007, the parties attended a pretrial conference before Judge William Fahey. At that time, Tong was represented by her fifth attorney, Fred Rucker. At the end of the pretrial conference, Judge Fahey ordered the parties to attend a mandatory settlement conference (hereinafter, "MSC") on February 7, 2007.

Judge Fahey asked Mr. Rucker whether Ms. Tong had "occasional difficulty with the English language," and Mr. Rucker indicated she did. The court ordered Mr. Rucker to have a Vietnamese interpreter present at the MSC.

The MSC was conducted before Judge Alice

Altoon on February 16, 2007. At its conclusion, the parties and their respective lawyers placed a settlement on the record. The following colloquy ensued:

"The Court: . . . [W]e have been in the middle of a mandatory settlement conference. And my understanding is that we have come to a settlement in this matter. [¶] And I don't know if somebody wants to put the settlement on the record.

Mr. McCord: I'll be happy to. [¶] The parties have agreed that the matter will be settled in the total sum of \$25,000 to be paid on behalf of the defendant to the plaintiff. [¶] We have agreed that payment will be made by the 28th of this month, contingent only upon timely receipt of an executed W9 form from the plaintiff. [¶] We have further agreed that the terms and conditions of this settlement will remain confidential as between the parties, and that no disclosure of the terms and conditions may be made other than as either of the parties may be compelled to do so by operation of law. [¶] We have agreed that the settlement of this matter does not constitute an admission of liability or wrongdoing on any part. [¶] Mr. Brownstein

has given his consent to the settlement. [¶] We have agreed that the terms and conditions of section 1542 of the California Civil Code shall be operative in this matter. [¶] We have further agreed that the check or draft will be made payable to the trust account of Mr. Rucker. Mr. Rucker has graciously agreed that he will see to it that all appropriate lien claims are resolved before disbursing funds to his client.

Mr. Rucker: In addition to those terms, your Honor, we have an agreement that while we do anticipate that there will be standard form written mutual release agreements to be executed by the parties, that this is a final and complete settlement and that it's enforceable pursuant to [Code of Civil Procedure] section 664.6. . . .

[¶] . . . [¶] Mr. Rucker: And then just one other term, your Honor, which is that, other than the sums previously recited to be paid by defendant to plaintiff, that all parties will bear their own fees and costs incurred in connection with this litigation.

The Court: All right. [¶] And Ms. Tong, you've heard the terms and conditions. Do you agree to that, ma'am?

Ms. Tong: Yes, your Honor.

The Court: And, Mr. Brownstein, you've heard the terms and conditions and you've agreed to those.

Mr. Brownstein: Yes, your Honor."

Four days later, Tong filed a handwritten pro se "complaint" requesting "cancellation" of the settlement agreement, claiming she had been forced into it. Tong contended she told the judge and her lawyer that she wanted to wait for the deposition of her expert before deciding whether to settle the case. The judge and lawyer, she claimed, told her there was no need for the deposition. Tong also said she needed a translator at the MSC. Tong supported her motion with a copy of a letter she purportedly sent to her lawyer, Mr. Rucker. In it, she said she "just want to cancelled [sic] it [the settlement]."

On March 6, 2007, Tong filed a lengthy handwritten ex parte application indicating she opposed the settlement and requesting a jury trial. She reiterated that her case should not have been settled without an expert to evaluate the case, and that she needed a translator at the hearing. She added that Mr. Rucker, Mr. McCord and another attorney concealed facts from her before the settlement. Judge Fahey indicated he was not prepared to rule on the motion without a transcript of the settlement hearing and continued the matter to March 19, 2007.

On March 8, 2007, Brownstein filed a motion to enforce the settlement agreement. At the same time,

Brownstein filed an opposition to Tong's *ex parte* motion to vacate the settlement agreement. In response, Tong filed two typewritten documents: a memorandum of points and authorities in opposition to defendants' motion to enforce the settlement; and a memorandum of points and authorities in support of her motion to vacate the settlement agreement. In them, she argued for the first time that she did not agree to the terms of the settlement.

The parties appeared before Judge Fahey on March 19, 2007. Judge Fahey indicated he read all the papers and granted Brownstein's motion to enforce the settlement.

On March 21, 2007, Tong filed a second *ex parte* application. Judge Fahey deemed it to be a motion for reconsideration. In it, Tong contended that her settlement was not fair because Mr. Rucker was substituted out as her attorney before the MSC took place and therefore could not have represented her. Judge Fahey pointed out that, in fact, the substitution of attorney was not filed with the court until February 22, 2007, six days after the settlement conference. He took the matter under submission and, on April 3, 2007, signed and entered a formal order enforcing the settlement agreement.

Tong filed a timely appeal.

DISCUSSION

I. The Trial Court Properly Enforced The Settlement Agreement

Tong contends the settlement agreement is not valid under Code of Civil Procedure section 664.6.

Specifically, she claims the record does not reflect her assent to the terms of the settlement and that there is insubstantial evidence to support Judge Fahey's finding that she did because Tong needed a Vietnamese interpreter and did not have one. We disagree.

Code of Civil Procedure section 664.6 provides, in pertinent part:

"If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. . . ."

The trial court's determination of whether the parties entered into a binding settlement agreement is reviewed for substantial evidence. (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911.) The determination of whether the statutory requirements were met, however, is a question of law. (*Conservatorship of McElroy* (2002) 104 Cal.App.4th 536, 544 (*McElroy*)). We turn first to the question of law.

A. The Statutory Requirements for a Settlement Agreement were Met

In *In re Marriage of Assemi, supra*, 7 Cal.4th 896, the Supreme Court articulated the elements necessary for a valid oral settlement agreement under section 664.6. First, the material terms of the settlement must have been explicitly defined. Second, the judicial officer must have questioned the parties about their understanding of the settlement. Third, the parties must have expressly acknowledged their understanding of and agreement to the settlement. (*Id.* at p. 911.) To be clear, the parties' assent need not

be in the Reporter's Transcript. While Section 664.6 "used to contain the requirement that an oral settlement must be 'orally *on the record* before the court.' The *on the record* requirement was removed via 1994 legislation. [Citation.]" (*Fiege v. Cooke* (2004) 125 Cal.App.4th 1350, 1356, emphasis original.)

Here, Tong concedes that the terms and conditions of the settlement agreement were placed on the record. Tong also admits the record shows that trial court asked her, "[Y]ou've heard the terms and conditions. Do you agree to that, ma'am?" and that she answered, "Yes." Tong claims, however, she did not actually agree to the settlement. She says her "yes" should be taken only to mean, "Yes, I've *heard* the terms and conditions," and not, "Yes, I *agree* to the terms and conditions."

We cannot accept Tong's proposition. Judge Altoon was simply stating a fact when she said Tong *heard* the terms and conditions of the settlement. Tong had spent the better part of a day discussing a settlement and was present when the recitation of the terms of the settlement was made and obviously heard them. Given this context, the comment by Judge Altoon that Tong heard the terms and conditions of the settlement could only be understood as a declaratory statement, not a question. When Judge Altoon then specifically queried whether Tong *agreed* to the terms. Tong's unequivocal response was "yes."

When the settlement was placed on the record, Tong was represented by counsel who assisted in reading the terms of the settlement into the record. Tong did not make any objection or request a clarification when Judge Altoon inquired of her.

In addition, Tong's claim is suspect in light of the numerous theories she has urged to escape the settlement. For example, in Tong's initial pro se "complaint" to set aside the settlement she claimed she was forced by counsel and the court to settle the case. She also indicated she "just really want [sic] to cancel it [the settlement]." When Tong filed her second motion to set aside the settlement, she argued that the attorneys withheld facts from her. After these arguments were unavailing, Tong claimed that the settlement should be set aside because her attorney had been removed from the case - a proposition proven to be factually inaccurate.

It is true that Tong's prior filings have alleged in a general way that she needed a translator, but they did not initially argue that she understood Judge Altoon's question only to be asking whether she understood the terms of the settlement agreement not whether she agreed to them. In fact, this argument was first filed in an opposition that Tong admits was "ghost-written with the informal assistance of legal counsel other than Mr. Rucker." Significantly, it requires a thorough comprehension of the English language, one Tong complains she does not have, to gather from her dialogue with Judge Altoon that she only agreed to understanding the terms of the settlement and did not agree to their content. Accordingly, we reject this argument and find the elements of a valid settlement agreement were present.

The cases cited by Tong -- *Levy v. Superior Court* (1995) 10 Cal.4th 578; *Johnson v. Department of Corrections* (1995) 38 Cal.App.4th 1700; and *Murphy v. Padilla* (1996) 42 Cal.App.4th 707 - stand for the proposition that the parties to a settlement agreement

must unambiguously agree to its terms. We of course agree with this rule, but do not find it helpful to Tong in the current case because the record reflects she was asked whether she understood and agreed to the terms of the settlement and indicated orally she did.

Another case upon which appellant relies, *McElroy, supra*, 104 Cal.App.4th 536, is similarly unavailing. There, the court held that a nod of the head is insufficient to show agreement to a settlement. Those facts are wholly different than the situation at bar, where Tong verbally indicated her agreement. (*Id.* at p. 547.)

B. Substantial evidence supports the trial court's finding that the parties entered into a binding settlement agreement

Turning to the second prong of our analysis, we find Tong's contention that the trial court's findings were not supported by the evidence lacks merit. Tong first brings up a procedural issue regarding Judge Fahey's findings. Citing *McElroy, supra*, 104 Cal.App.4th 536, Tong suggests the substantial evidence rule should not apply to this case because when Judge Fahey made his findings he did so by merely reviewing a transcript of the settlement proceeding made by Judge Altoon, which we can review as readily as he did. Her factual premise is wrong. Judge Fahey's finding that there was a valid settlement does not rely simply on the record of the settlement, but on the entire proceedings before him. The record of Judge Fahey's ruling is set forth below and makes this clear. More importantly, though, the *McElroy* case Tong relies on stands for the *exact opposite* proposition. In *McElroy*, the Court of Appeal

decided it was appropriate to apply the substantial evidence standard of review even though the record included a video tapped recording of the proceedings. (*Id.* at pp. 545-546.)

Further, Judge Fahey's finding that Tong understood she was agreeing to settle her case for \$25,000 is supported by the record. Judge Fahey made a thorough review of the record and stated:

"The Court: The record reflects, and I think counsel reported that Judge Altoon spent many hours with the parties. Judge Altoon, of course, is a very competent and experienced jurist, and I'm sure she would have noted during the proceedings had there been a problem with plaintiff's ability to understand what was occurring during the settlement conference. [¶] I've carefully reviewed the file, including the transcript of the settlement, and there's no indication that Judge Altoon believed that there was any language difficulty. [¶] Further, the transcript reflects that the plaintiff agreed to settle the case. She was then represented by counsel, and there was no indication by the plaintiff or her attorney at that time that the plaintiff could not understand the proceedings and the settlement terms. [¶] Finally, I would note that the plaintiff has filed a declaration, and it is in English. There's no indication that a translator was used, and I feel confident, based upon all of

these facts, that the plaintiff, Ms. Tong, knowingly and intelligently understood the settlement of this case, including the posture of the case, and therefore, I think the settlement should be enforced."

The trial court found that Tong understood English sufficiently to bind her to the settlement agreement, and we agree. In our view the record does not show a lack of knowledge at the time of settlement; it shows "settler's remorse" after the fact.

II. Appellant's Tong's Argument that the Trial Court Failed to Rule on a Motion has been Waived.

Tong contends the trial court abused its discretion by failing to address her argument that the settlement should have been set aside pursuant to Code of Civil Procedure section 473, subdivision (b). This issue has been waived for purposes of appellate review.

Tong claims she raised these issues in her ex parte papers to undo the settlement which she filed on March 6, 2007. However, California Rules of Court, Rule 3.1201, subdivision (1) requires that an ex parte application state the nature of relief requested. The ex parte application contained a lengthy heading, but it made no reference to Code of Civil Procedure section 473, subdivision (b). Accordingly, Tong failed to direct the trial court to rule on this matter. Tong also asserts she raised this issue in her opposition to Brownstein's motion to enforce the settlement agreement which she filed with the trial court on March 14, 2007. Tong's opposition to Brownstein's motion to enforce the

settlement rested on her assertion that she had not agreed to the settlement; she did not argue that she had entered the settlement as the result of her mistake or inadvertence. Because Tong failed to properly bring the alleged issue to the trial court's attention in the first instance, she cannot seek review of the issue here now. (*Imperial Bank v. Pim Electric, Inc.* (1995) 33 Cal.App.4th 540, 546.)

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

Bigelow, J.

We concur:

Cooper, P. J.

Flier, J.

Court of Appeal, Second Appellate District, Div. 8

No. B199596

S167417

IN THE SUPREME COURT
OF CALIFORNIA

En Banc

TU MY TONG, Plaintiff and Appellant

v.

WILLIAM H. BROWNSTEIN & ASSOCIATES,

Defendants and Respondents.

The petition for review is denied.

SUPREME COURT
FILED
NOV. 12, 2008

Frederick K. Ohirich Clerk

DEPUTY
GEORGE

Chief Justice